Supreme Court, U.S.
FILED
DEC 27 1990
JOSEPH F. SPANIOL, JR.
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(3)

NO. 90-662

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1990

INSURANCE COMPANY OF NORTH AMERICA

Petitioner

vs.

M/V OCEAN LYNX, a/k/a M/V OCEAN LINK, her engines, tackle, furnishings, etc., in rem, MAR SHIPPING, INC., a foreign corporation, A. BOTTACCHI S.A. DE NAVEGACION,a foreign corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENT TO PETITION FOR
WRIT OF CERTIORARI
U.S. DISTRICT COURT OPINION

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UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

INSURANCE COMPANY OF NORTH AMERICA,

Plaintiff,

vs.

MAR SHIPPING LINE, INC., a foreign corporation and A. BOTTACCHI S.A. DE NAVEGACION, a foreign corporation,

Defendants.

CASE NO.: 86-0650
CIV-HASTINGS

FINAL JUDGMENT

On the Findings of Fact and Conclusions of Law entered herein, it is hereby

ORDERED AND ADJUDGED that Plaintiff INSURANCE COMPANY OF NORTH AMERICA have and recover the sum of $29,500.00 against defendant MAR SHIPPING LINE, INC., together with prejudgment interest[1] of 7.70% per annum

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[1] Prejudgment interest is allowed in admiralty cases. Self v. Great Lakes Dredge & Dock Company, et al., 832 F.2d 1540 (11th Cir. 1987).

from June 7, 1985, plus interest from the date of entry of this judgment at the rate of 7.22% per annum.

IT IS FURTHER ORDERED AND ADJUDGED that MAR SHIPPING LINE INC. have and recover the sum of $29,500.00 against the defendant A. BOTTACCHI S.A. DE NAVEGACION, together with prejudgment interest of 7.70% per annum from June 7, 1985, plus interest from the date of entry of this judgment at the rate of 7.22% per annum

DONE AND ORDERED at Miami, Florida, this 29 day of December, 1987.

original signed
UNITED STATES DISTRICT JUDGE
ALCEE L. HASTINGS

Copies to:

Mary Lou Rodon-Alvarez, Esquire
Allan R. Kelley, Esquire
G. J. Rod Sullivan, Jr., Esquire

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

INSURANCE COMPANY OF NORTH AMERICA,

Plaintiff,

vs.

M/V OCEAN LYNX, also known as M/V OCEAN LINK, her engines, tackle, furnishings, etc., IN REM; MAR SHIPPING LINE, INC., a foreign corporation and A. BOTTACCHI S.A. DE NAVEGACION, a foreign corporation,

Defendants.

CASE NO.: 86-0650
CIV-HASTINGS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE was tried to the Court, sitting without jury, and after considering the stipulations of the parties, the testimony of witnesses, and the documentary and physical evidence, the Court makes the following findings of fact and conclusions of law.

INTRODUCTION

On or about June 7, 1985, the M/V Ocean

Lynx[1] was at sea en route to Buenos Aires, Argentina, following its departure from Miami. After encountering southwesterly winds and rough seas, three successive heavy waves struck the vessel causing it to roll more than 35 degrees to each side. The severe roll caused five containers to burst their lashings and wash overboard.

One of the containers lost at sea contained 56 boxes and 3 crates of vocational agricultural machinery and parts. These items were insured under a marine cargo policy provided by the plaintiff. A proper claim was filed and a settlement draft issued to the shipper. Thereafter, this action was commenced. MAR SHIPPING LINE, INC. has since

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[1] This is the correct name of the vessel. The parties agree that the name "Ocean Link" appears to have found its way into this case as a product of scriveners error.

filed a cross-claim against A. BOTTACCHI S.A. DE NAVEGACION.

I. FINDINGS OF FACT[2]

1. The plaintiff Insurance Company of North America ("INA"), is a corporation organized under the laws of Pennsylvania. INA is engaged in the insurance of marine cargo.

2. The defendant MAR Shipping Line, Inc. ("MAR"), is a corporation organized under the laws of Florida. MAR is a non-vessel operating common carrier ("NVOCC").[3]

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[2] To the extent that the findings of fact are interpreted as conclusions of law, they are so considered. Conversely, to the extent that the conclusions of law are interpreted as findings of fact, they too are so considered.

[3] Title 46 C.F.R. Section 510.2(k) (1986) provides that a "'non-vessel-operating carrier' means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier."

3. Defendant A. BOTTACCHI S.A. De NAVEGACION ("BOTTACCHI") is a corporation organized and existing under and by virtue of the laws of the Republic of Argentina. BOTTACCHI conducts business in Florida as a common carrier[4] of merchandise by water for hire and at the time was operating the M/V Ocean Lynx.

4. The M/V "OCEAN LYNX" is a three-decked general cargo/container vessel with six holds and fourteen hatches.

5. Educational Innovation Systems International ("Edusystems") is a corporation organized under the laws of Wisconsin. Edusystems is engaged in, inter alia,

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[4] Title 46 C.F.R. Section 510.2 (e) (1986) provides that "'common carrier' means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country."

providing vocational agricultural machinery and parts to South America.

6. S.E.L. Maduro (Florida), Inc. ("Maduro") is a corporation organized under the laws of Florida. Maduro provides agency, stevedoring and terminal services at Miami, Florida.

B. The Facts

7. On April 24, 1985, Edusystems sold ten crates of vocational agricultural machinery and parts to the Ministry of Public Health and Welfare in Asuncion, Paraguay. The equipment sold for $77,748.40 and was insured with INA in the amount of $85,600[5] under special marine policy No. C325426. On April 30, 1985, Edusystems sold 56 boxes of vocational agricultural machinery to the

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[5] This amount represents cost, insurance and freight (CIF) plus ten percent.

Ministry of Culture and Education, also in Asuncion. This equipment was sold for $134,618.77 and was insured for $159,220.00 under special marine policy No. C325431.[6]

8. At its plant in Fontana, Wisconsin, Edusystems loaded and sealed the 56 boxes of equipment in container number ADCU-202107-6. The container and nine crates arrived by rail in Miami, via Chicago, Illinois. The remaining tenth crate was shipped by Edusystems from London, England to Miami.

9. Edusystems employed the services of a freight forwarder, Meadows Wye and Company in Miami, to arrange for the booking of the two shipments. Meadows Wye had acted as freight forwarder for Edusystems on prior shipments to Paraguay.

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[6] This amount represents CIF value plus twenty percent.

10. At its terminal in Miami, Meadows Wye loaded and resealed three of the Edusystems crates (crate Nos. 4, 9, and 10) into container ADCU-202107-6.

11. Meadows Wye enlisted MAR to provide the carrier services and prepared the MAR master bills of lading on the two shipments. MAR, a NVOCC, was the only carrier in Miami at the time handling cargo en route to Asuncion. Meadows Wye understood and agreed that MAR would transport the equipment via BOTTACCHI.

12. Meadows Wye had conducted business in the past with MAR, BOTTACCHI and the M/V OCEAN LYNX in a container carrier capacity. Meadows Wye maintained a blank BOTTACCHI bill of lading at its offices in Miami.

13. MAR received the master bills of lading prepared by Meadows Wye on or about May 9, 1985 for completion of the freight rating in the lower portion of each form. Each bill

of lading was accompanied by a separate Shipper's Export Declaration ("SED") form for delivery to the United States Customs Service in Miami.

14. Each SED contains various information regarding the shipment. In this case, the block designated as No. 2 shows the method of transportation to be by vessel. Block 2a lists MAR as the shipper, while Block 3 shows Edusystems as the exporter. Block 4, which requests the agent of the exporter, lists the name of Meadows Wye. Block 5 shows the consignee as Ministerio de Educacion y Culto, Asuncion, Paraguay. Block 10 describes the commodities as "56 CARTONS STC MACH & TOOLS." Finally, Block 15 indicates the value of this shipment, in U.S. dollars, to be $132,674.

15. The second SED form contains the identical information, but for changes in the

consignee and freight. The consignee is listed as SENASA, Asuncion, Paraguay. Block 10 shows the freight to be "10 PCS. STC MACHINERY & TOOLS." The value of the freight is shown as $77,748.

16. On April 30, 1985, Meadows Wye shipped the loaded container, now carrying 56 boxes and three (3) crates, directly to BOTTACCHI"s terminal operator at the Port of Miami, S.E.L. Maduro. Meadows Wye shipped the remaining seven crates of equipment to Maduro on May 2, 1985. Maduro loaded these seven crates into container UFCU-216939 on May 14, 1985.[7] MAR never took actual delivery of the Edusystems freight.

17. Meadows Wye had not been requested by Edusystems to make a declaration of value

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[7] These seven crates arrived at their destination without incident and do not form part of this action.

nor did Edusystems request under-deck storage of the two shipments to Paraguay. No such request been made on similar machinery shipments handled by Meadows Wye in the past.

18. After receiving the two master bills of lading, MAR completed the freight information and designated each as Nos. AS-01 and AS-02. Both forms are dated May 9, 1985. Bill of lading No. AS-01 was issued for the carriage of one container said to contain 56 boxes of vocational agricultural machinery. No. AS-02 was issued for the carriage of ten crates of machinery and tools.

19. The front of the MAR master bill of lading form contains a masthead with the company's name and address, as well as telex and phone numbers. The base of the form contains a block showing the freight computation, the bill of lading number, the date, and a signature block for MAR Shipping

Line, Inc. It makes no reference to the terms on its reverse side.

20. The back of the MAR bill of lading contains 27 clauses which seem to be a reproduction of the same clauses contained on the back of the BOTTACCHI bill of lading. The clauses on the MAR bill of lading appear blurry. With the aid of a magnifying glass, however, most of the words and numerals can be read by a party examining the terms and conditions stated therein.

21. Directly above Clause 1, the back of the MAR bill of lading states: "The following are the conditions and exceptions referred to on the face of this Bill of Lading." There is, however, no such reference on its face.

22. The first line of Clause 1 provides: "This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States of America

approved April 16, 1938."

23. Clause 16 reads in pertinent part:

> In case of any loss or damage to or in connection with goods exc[illegible letters]ing in actual value $500 lawful money of the United States per package, or in case of goods not shipped in packages per customary freight unit the value of the goods shall be deemed to be $500 per package or per unit on which basis the freight is adjusted...unless the nature of the goods and valuation higher than $500 shall have been declared in writing by the Shipper upon delivery to the Carrier and inserted in this bill of lading and extra freight paid if required...and the Carrier's liability if any shall not exceed the declared value...

24. On May 15, 1985, BOTTACCHI issued its bill of lading no. BAS-014 to MAR for the carriage of the 56 boxes plus the 10 crates from the port of Miami. The original BOTTACCHI bill of lading was prepared by Continental Freight Forwarding, Inc., MAR's freight forwarder. It shows the shipper to be MAR Shipping Line, Inc., as agents of Educational Innovation Systems International,

Inc. The exporting vessel is listed as the M/V OCEAN LYNX. A section of this form, designated as "ONWARD INLAND ROUTING", states: "CORRESPONDE MAR B/L AS-01 / AS-02."

25. The bottom half of the front of the BOTTACCHI bill of lading contains the following section reproduced below:

[Insert copy here]

26. The back of the BOTTACCHI bill of lading contains 27 clauses. Although the print is small, the clauses are entirely legible without the aid of magnifying glass. Clause 1 and Clause 16 of the MAR bill of lading set forth above are identical to the same clause on the BOTTACCHI bill of lading. A comparison of both bills of lading discloses that the illegible word in Clause 16 of the MAR bill of lading above is "exceeding."

27. MAR requested and received from MADURO a correction to manifest No. 149,

dated May 17, 1985. The correction contained four amendments attempting to effect the following changes:

> (a) The name of the shipper was changed to MAR Shipping Line, Inc., thereby removing the words "as agent of Educational Innovation Systems International, Inc.,";
>
> (b) The consignee was changed from Ministerio de Educacion y Culto to "to the order of shipper";
>
> (c) A statement was added in the body of the bill of lading indicating "declared value of goods in Container ADCU 202107-6 U.S.D.156,000.00. Value of goods in UFCU 226939 U.S.D.54,425.00."; and
>
> (d) The spelling of the vessel's name was changed from "Ocean Link" to "Ocean Lynx."

28. After weighing the testimony of the witnesses, and considering their interest in the outcome of the case and their candor and manner of testifying, and to extent to which they have been supported or contradicted by other credible evidence, the Court finds that Correction to Manifest #149 was prepared at

some point in time after the loss occurred.[8]

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[8] Among those facts supporting this finding are:

(a) The chronological correction to manifest log maintained by SEL Maduyro indicates that Corrections to Manifest Nos. 146 and 147 were received and issued on June 5, 1985. No. 148 was prepared and issued on June 6, 1985. No. 150 was prepared and issued on June 10, 1985. No. 151 was prepared and issued on July 24, 1985. Thus, correction No. 149, dated May 17, 1985 would have been assigned a number entirely out of sequence. No explanation for this occurrence was offered.

(b) Alternatively, it may be argued that the correction was received on May 17, 1985 but not processed. However, the Court is convinced by the testimony of Eugene Picciano, from SEL Maduro, that a correction to the manifest is either processed immediately or put aside without assigning a number to it, but in such a case it would not remain pending for a long period of time. When a correction affects the freight rate, Mr. Picciano further testified that the change would not be automatically accepted. Instead, Bottacchi would have been consulted by Tony Blanco, who was the individual then responsible for handling such a change.

(c) Tony Blanco, formerly of SEL Maduro, testified that although manifest change No. 149 indicated a change in the declared value, he would not have paid much attention to it because such a change in the declared value

29. In 1985, the custom and practice at the Port of Miami concerning the carriage of containers included under-deck as well as on-deck storage.[9]

30. On June 7, 1985, the Ocean Lynx lost five containers over the side of the vessel. Among those lost was No. ADCU 202107-6 which

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would not have been handled in this manner.

(d) The fact that Correction No. 149 was typed, when according to Mr. Blando's testimony, corrections of manifest have always been handwritten.

These facts, taken together, indicate to this Court that the correction to manifest was prepared after the loss had occurred.

[9] Testimony of Eugene Picciano, SEL Maduro. If not the last, Miami is one of the last ports for a vessel voyaging to South America. At any one of the prior ports, containers are first loaded into the under-deck of the vessel. In most cases, by the time a ship reaches Miami, the under-deck compartment for containers has become full. On-deck storage is then used because the ship will not re-position containers.

contained the 56 cartons and 3 crates of machinery and tools shipped by Edusystems.[10]

31. The CIF value of the goods represented by MAR bill of lading No. AS-01 which were lost over the side of the vessel was $134,618.77. Their insured value was $159,220.00.

32. The CIF value for the portion of goods represented by MAR bill of lading AS-02 which were lost over the side of the vessel was $38,865.64. The insured value of these goods was $42,752.20.

33. Edusystems suffered a CIF loss of $173,484.41. It filed a claim upon its

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[10] INA indicates that a total of 63 cartons were lost overboard. This figure represents the 56 cartons plus an apparent 7 cartons contained in the 3 crates. Because the number of packages contained in each crate was never broken down nor otherwise disclosed to MAR or Bottacchi, the Court finds the total number of packages lost at sea to be fifty-nine (59).

insurance company, Insurance Company of North America, and was paid a total $201,972.20, representing the insured value of the goods.

34. MAR Shipping has on file an approved tariff with the Federal Maritime Commission, including a true and correct copy of the front and back of the MAR bill of lading. The tariff contains a clause in Rule 12, concerning ad valorem declarations.

II. CONCLUSIONS OF LAW

1. By reason of the payment to Edusystems, Plaintiff became subrogated to the rights of its named insured and thus a proper party to bring this action.

2. The court has jurisdiction over the subject matter of this controversy pursuant to Admiralty and Maritime jurisdiction, 28 U.S.C. Section 1333. The Court has proper jurisdiction over the plaintiff and defendants MAR and BOTTACCHI. Because the Court does not

have jurisdiction over the M/V Ocean Lynx, the vessel has been dismissed from this controversy.[11]

3. MAR Shipping is an NVOCC. An NVOCC is a common carrier with respect to the shippers using its services. Insurance Co. of N. America v. S/S American Argosy, 732 F.2d 299 (2d Cir. 1984). With respect to the vessel, however, an NVOCC is an agent of the shipper and customer of the ship. Id.

4. Edusystems was the shipper of the cargo that was in container ADCU 202107-6. Thus, with respect to this shipment MAR was an agent acting on behalf of Edusystems. Correspondingly, in MAR's transactions with BOTTACCHI, its role was that of a customer to the ship.

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[11] The Court has also dismissed Nabadi Maritime, S.A. for lack of jurisdiction.

5. The Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. Section 1301 et seq., applies to bills of lading and contracts for carriage of goods by sea to or from ports of the United States with certain exceptions.

6. There were two contracts of carriage issued for the shipment of the cargo. Between Edusystems and MAR, the two MAR bills of lading created the initial carriage agreement, i.e., shipper to NVOCC. The bill of lading issued by BOTTACCHI to MAR constituted the second contract for carriage of the Edusystems cargo, i.e., NVOCC to vessel. The first bill of lading was not merely a formality because MAR Shipping was not authorized to issue bills of lading on behalf of BOTTACCHI.[12]

7. The term "goods" as used in COGSA

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[12] Testimony of Captain Jorge Ves Losada, from Bottacchi.

does not include cargo which under the contract of carriage is stated as being carried on deck and is so carried. 46 U.S.C. Sec. 1301(c).

8. COGSA applies to the contract of carriage in this case because the container was shipped in foreign trade (i.e., transportation of goods between the United States and a foreign port) under a bill of lading. See 46 U.S.C Secs. 1300, 1312. In addition, Clause 1 of the MAR and BOTTACCHI bills of lading expressly incorporated COGSA.

9. Because COGSA applies, it will govern and overrule any clause in the bill of lading in conflict with the statute. Brown & Root, Inc. v. M/V Peisander, 648 F.2d 415 (5th Cir. June, 1981).

10. To establish a prima facie case of liability against a carrier under COGSA, cargo interests must show that the cargo was

received in good condition by the carrier and that the cargo was delivered damaged. Terman Foods, Inc. v. Omega Lines, 707 F.2d 1225 (11th Cir. 1983). INA has established a prima facie case of liability against MAR. MAR's relationship to Edusystems places it in constructive possession of the goods. There has been no suggestion that the cargo was anything but in good condition, and of course, its loss overboard constitutes the damage.

11. Without an express agreement regarding below deck storage, the issuance of a clean bill of lading by the carrier indicates that the cargo is considered contracted to be carried below deck. Calmaquip Eng. West Hemisphere Corp. v. West Coast Carriers, 650 F.2d 633, 638-39 (5th Cir. Unit A July 1981).[13]

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[13] Decisions of the Former Fifth Circuit filed prior to October 1, 1981 constitute binding precedent in the Eleventh Circuit.

12. A shipper and an ocean carrier may contractually agree to extend the application of COGSA beyond its normal parameters. When COGSA is incorporated by reference, it becomes a contractual term of the bill of lading. Colgate Palmolive Company v. S.S. Dart Canada, 724 F.2d 313 (S.D.N.Y.), Cert. denied, 104 S.Ct. 2181 (1983).

13. Clause 7 of the BOTTACCHI bill of lading created an express agreement for the on-deck storage of goods.

14. Even in the absence of an express agreement, the custom and practice at the Port of Miami concerning under-deck as well as on-deck carriage of containers provides a basis from which to impute the consent of MAR Shipping as to the on-deck storage of

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Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

container No. ADCU 202107-6. English Electric Valve Co., Ltd. v. M/V Hoegh Mallard, 637 F.Supp. 448 (S.D.N.Y. 1986). Accordingly, the on-deck storage of container No. ADCU 202107-6 was not an unreasonable deviation from the contract of carriage constituting a fundamental breach of that contract. American Cyanamid Co. v. Booth S.S. Co., Ltd., 99 F.Supp. 232 (S.D.N.Y. 1951), Aff'd, 195 F.2d 529 (2d Cir. 1952).

15. Even in the absence of an express agreement, the practice of MAR with respect to the handling of prior shipments from Edusystems was to not request under-deck storage.[14] Thus, MAR Shipping expected, and can be reasonably charged with the knowledge of the on-deck storage of containers.

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[14] Testimony of Roberto Garofalo, president of MAR Shipping.

Accordingly, the on-deck storage container No. ADCU 202107-6 was not an unreasonable deviation from the contract of carriage constituting of a fundamental breach of that contract.

16. Package Limitation.[15] Finding no unreasonable deviation from the contract of carriage, the Court must now address the application vel non of the $500 package limitation.

The limitation of liability arises under COGSA Section 4(5), 46 U.S.C. 1304(5).[16]

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[15] The effect of MAR's tariff is treated separately. See Infra, paragraph 21.

[16] The relevant section of 46 U.S.C. 1304(5) provides:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in

Generally, it is the ocean carrier who bears the burden of providing the shipper with a fair opportunity to avoid the COGSA package limitation by declaring the value of the goods and paying the additional freight. Komatsu, Ltd. v. States Steamship Company, 674 F.2d 806 (9th Cir. 1982).

17. In this circuit, however, the shipper caries the burden of proving that an opportunity for a choice of valuation and rates did not in fact exist. Brown & Root, Inc. v. M/V Peisander, 648 F.2d 415 (5th Cir. June 1981); cf. Korematsu, 674 F.2d 806.

> the case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading shall be prima facie evidence, but shall not be conclusive on the carrier.

18. Clause 16 of the MAR and BOTTACCHI bills of lading contains a recitation limiting liability similar to that of COGSA Section 4(5). INA contends, however, that the differences between Clause 16 and COGSA Section 4(5) create ambiguities leaving a shipper in doubt as to the package limitation. There is no merit to this argument. The application of COGSA necessarily incorporates Section 4(5), 46 U.S.C. Sec. 1304(5), and COGSA overrules any conflict between it and the bill of lading. Brown & Root, supra.

19. INA failed to demonstrate a lack of opportunity to declare value. As a matter of law, the incorporation of COGSA in Clause 1 of the MAR bill of lading provides a fair opportunity. The bill of lading utilized by MAR Shipping provided Edusystems with a fair opportunity to declare valuation. In addition, the reverse side of the MAR bill of

lading is identical to that of the BOTTACCHI bill of lading. MAR was fully aware of this fact, yet never declared valuation to BOTTACCHI when acting in its role as agent for Edusystems.[17]

20. Despite the opportunity to declare a value on the goods, neither Edusystems nor MAR did so. Because this Court finds that Correction to Manifest No. 149 was prepared after the loss, see supra paragraph 28, the attempt to declare valuation was ineffective as a matter of law.[18]

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[17] Mr. Garafalo testified that it was MAR Shipping's responsibility, and not that of Edusystems, to request a value declaration.

[18] Interestingly, on cross-examination in her deposition testimony Judy Turner, the contract manager for Edusystems, stated that since the loss in this case no value declarations have been made on subsequent shipments. Plaintiff's Exhibit 36 at pp. 51, 52. The reason for doing so seems to be that because Edusystems obtains cargo insurance the package limitation are no little consequence.

21. The Effect of MAR's Tariff. MAR has a valid tariff filed with the Federal Maritime Commission.[19] As it applies in this case, the tariff becomes the law establishing the applicable standard for a declaration of

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Thus, the economics of cargo insurance are such that the added freight costs incurred from a value declaration would be unnecessary. Id. at p. 58. To this Court, Edusystems conduct with regard to its goods manifest an intent to not declare a higher value on the equipment it ships.

[19] Testimony of Mr. Mike Telleo, Federal Maritime Commission (Miami). For reasons still unclear to this Court, Mr. Telleo and MAR Shipping stressed to the Court that Mr. Telleo was not testifying as a representative of the Commission. Rather, his testimony was based solely upon his own personal experience. Under the circumstances, however, it seems impossible to distinguish between the two. Mr. Telleo clearly acquired his experience with regard to the MAR tariff only because of his position with the Federal Maritime Commission. This fact, and INA's failure to object to the validity of the tariff, lead to the conclusion that the tariff has been properly established with the Commission.

value. Brown & Root at 421. In MAR's tariff, Rule 8 and 12 provide the manner and additional freight rates with which a shipper must comply in order to increase the carrier's liability beyond the $500 package limitation. More significantly than the bill of lading, the tariff provides a fair opportunity to declare a higher value. Edusystems did not make a declaration and no additional rates were charge or paid. Thus, the $500 package limitation remained in full force and effect.

III. CONCLUSION

In accordance with the Findings of Fact and Conclusions of Law, it is hereby

ORDERED AND ADJUDGED:

(1) That judgment be entered in favor of Insurance Company of North America, Edusystems' subrogated insurer, against MAR Shipping Line, Inc.

(2) That MAR Shipping Line, Inc. is

entitled to limit its liability to INA, pursuant to MAR's bill of lading and tariff, to $29,500, representing the loss of 59 packages at $500 each.

(3) That judgment be entered in favor MAR Shipping Line, Inc. against A. BOTTACCHI S.A. De NAVEGACION.

(4) That A. BOTTACCHI S.S. DE NAVEGACION is entitled to limit its liability to MAR Shipping Line, Inc., pursuant to BOTTACCHI's bill of lading, to $29,500 representing the loss of 59 packages at $500 each.

IT IS FURTHER ORDERED AND ADJUDGED that the parties submit memoranda of law on the issues of costs and attorney fees within ten (10) days from the date of these Findings of Fact and Conclusions of Law.

DONE AND ORDERED at Miami, Florida, this 29th day of December, 1987.

UNITED STATES DISTRICT JUDGE
ALCEE L. HASTINGS

Copies to:

Mary Lou Rodon-Alvarez, Esquire
Allan R. Kelley, Esquire
G. J. Rod Sullivan, Jr., Esquire